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Supreme Court of the United States

JAMES OBERGEFELL, ET AL., AND BRITTANI HENRY, ET AL., PETITIONERS,
v.
RICHARD HODGES, DIRECTOR, OHIO DEPARTMENT OF HEALTH, ET AL., RESPONDENTS.

VALERIA TANCO, ET AL., PETITIONERS,
v.
WILLIAM EDWARD "BILL" HASLAM, GOVERNOR OF TENNESSEE, ET AL., RESPONDENTS.

APRIL DEBOER, ET AL., PETITIONERS,
v.
RICK SNYDER, GOVERNOR OF MICHIGAN, ET AL., RESPONDENTS.

GREGORY BOURKE, ET AL., AND TIMOTHY LOVE, ET AL., PETITIONERS,
v.
STEVE BESHEAR, GOVERNOR OF KENTUCKY, ET AL., RESPONDENTS.

On Writs of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF OF AMICI CURIAE ANTI-DEFAMATION LEAGUE IN SUPPORT OF PETITIONERS

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QUESTIONS PRESENTED

(1) Does the Fourteenth Amendment require a State to license a marriage between two people of the same sex?

(2) Does the Fourteenth Amendment require a State to recognize a marriage between two people of the same sex when their marriage was lawfully licensed and performed out-of-state?

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	vi
INTEREST OF *AMICI*	1
SUMMARY OF ARGUMENT	1
ARGUMENT	3
I. RELIGIOUS AND MORAL DISAPPROVAL HAS HISTORICALLY BEEN AN UNSUSTAINABLE BASIS FOR JUSTIFYING LAWS DISADVANTAGING MINORITY GROUPS	3
A. Respondents' *Amici* Advance Religious And Moral Justifications For Marriage Equality Bans	3
B. Laws Disadvantaging Minority Groups Have Historically Been Justified By Religious And Moral Disapproval	5
C. Religious and Moral Justifications For Unequal Treatment Have Been Abandoned And Opinions Upholding Them Are Viewed As Anachronistic Blemishes	12

TABLE OF CONTENTS—Continued

Page

II. MARRIAGE BANS VIOLATE THE ESTABLISHMENT AND EQUAL PROTECTION CLAUSES BECAUSE THEY WERE ENACTED WITH THE PURPOSE OF IMPOSING A PARTICULAR RELIGIOUS UNDERSTANDING OF MARRIAGE AS LAW AND EXPRESSING MORAL DISAPPROVAL 14

A. The Establishment Clause Prohibits Laws That Lack A Secular Purpose And Have The Primary Purpose Or Effect Of Advancing One Religious View Over Others 14

B. "Moral Disapproval" Does Not Constitute A Legitimate State Interest, And Therefore The Marriage Bans Also Violate The Equal Protection Clause 20

III. A DECISION INVALIDATING THE MARRIAGE BANS WOULD NOT THREATEN RELIGIOUS LIBERTY 23

A. Civil Marriage Is Distinct From, And Does Not Affect, Religious Marriage 24

B. Marriage Equality Is A Separate And Distinct Issue From Anti-Discrimination Laws 28

C. Commercial Businesses Have No Constitutional Right To Discriminate 29

CONCLUSION 31

TABLE OF CONTENTS—Continued

APPENDIX Page

APPENDIX: *Amici Curiae* Statements Of Interest 1a

TABLE OF AUTHORITIES

CASES Page(s)

Bandari v. INS, 227 F.3d 1160 (9th Cir. 2000) 26

Bell v. Maryland, 378 U.S. 226 (1964)..... 29

Berea College v. Commonwealth, 29 Ky. L. Rptr. 284 (Ky. 1906)..... 8

Bob Jones Univ. v. United States, 461 U.S. 574 (1983)..... 11, 26

Boddie v. Connecticut, 401 U.S. 371 (1971)..... 27

Bowers v. Hardwick, 478 U.S. 186 (1986)..... 1, 21

Bowie v. Birmingham Ry. & Elec. Co., 125 Ala. 397 (1900) 8

Bradwell v. Illinois, 83 U.S. 130 (1873)..... 11, 13

Brown v. Board of Education, 347 U.S. 483 (1954).....*passim*

Cathy's Tap, Inc. v. Village of Mapleton, 65 F Supp.2d 874 (C.D. Ill. 1999)..... 17

Dred Scott v. Sandford, 60 U.S. 393 (1857)..... 7, 12, 30

Edwards v. Aguillard, 482 U.S. 578 (1987). 16

Elane Photography, LLC v. Willock, 309 P.3d 53 (N.M. 2013), *cert. denied*, 134 S. Ct. (2014)..... 28

Epperson v. Arkansas, 393 U.S. 97 (1968)..... 15, 16, 26

TABLE OF AUTHORITIES—Continued

Page(s)

Everson v. Bd. of Educ. of Ewing Twp., 330 U.S. 1 (1947) 15

Frontiero v. Richardson, 411 U.S. 677 (1973) 12, 13

Green v. State, 58 Ala. 190 (1877) 9

Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241 (1964) 29

Kinney v. Commonwealth, 71 Va. 858 (1878) 9

Larson v. Valente, 456 U.S. 228 (1982) 15

Lawrence v. Texas, 539 U.S. 558 (2003) 20, 21, 22

Lee v. Weisman, 505 U.S. 577 (1992) 15

Lemon v. Kurtzman, 403 U.S. 602 (1971) 16

Loving v. Virginia, 388 U.S. 1 (1967) 10, 12, 22, 27, 30

Marsh v. Alabama, 326 U.S. 501 (1946) 29

Maynard v. Hill, 125 U.S. 190 (1888) 8-9

McCreary County, Kentucky v. Am. Civil Liberties Union of Kentucky, 545 U.S. 844 (2005) 14-15, 16

Messenger v. State, 41 N.W. 638 (Neb. 1889) 29

Mississippi University for Women v. Hogan, 458 U.S. 718 (1982) 12

TABLE OF AUTHORITIES—Continued

Page(s)

Newman v. Piggie Park Enterprises, Inc., 256 F. Supp. 941 (D.S.C. 1966), *aff'd in relevant part and rev'd in part on other grounds*, 377 F.2d 433 (4th Cir. 1967), *aff'd and modified on other grounds*, 390 U.S. 400 (1968) 11

Otter v. Latta, 771 F.3d 456 (9th Cir. 2014) 5

Plessy v. Ferguson, 163 U.S. 537 (1896) 30

Roberts v. U.S. Jaycees, 468 U.S. 609 (1984) 29

Romer v. Evans, 517 U.S. 620 (1996) 21, 22

Scott v. Emerson, 15 Mo. 576 (Mo. 1852) 7

Scott v. State, 39 Ga. 321 (1869) 9

South Carolina v. Regan, 465 U.S. 367 (1984) 12

State v. Gibson, 36 Ind. 389 (1871) 8

State ex rel. Hawkins v. Board of Control, 83 So.2d 20 (Fla. 1955) 10

United States v. Windsor, 570 U.S. ___, 133 S. Ct. 2675 (2013) 20, 21, 22

U.S. Dep't of Agric. v. Moreno, 413 U.S. 528 (1973) 22

West Chester & Philadelphia Railroad Co. v. Miles, 55 Pa. 209 (Pa. 1867) 8

TABLE OF AUTHORITIES—Continued

CONSTITUTIONS Page(s)

U.S. Const. amend. I ..... *passim*
U.S. Const. amend. V 21, 22
U.S. Const. amend. XIII 5, 7
U.S. Const. amend. XIV ..... *passim*
Ky. Const. § 233A 1, 3
Mich. Const. art. I, § 25 ..... 1, 3
Ohio Const. art. XV, § 11 ..... 1, 3
Tenn. Const. art. XI, § 18 ..... 1, 3

STATUTES

23 U.S.C. § 158 17
Ky. Rev. Stat. § 242.185 17
Ky. Rev. Stat. § 402.005 (1998) 19
Mich. Comp. Laws § 551.1 (1996) 19
Ohio Rev. Code § 3101.01 (2004) 19
Tenn. Code Ann. § 36-3-113(a) (1996) 19

COURT FILINGS

Br. for Petitioners, *Bourke v. Beshear*, No. 14-574 (U.S. Feb. 27, 2015) 20, 23
Br. for Petitioners, *DeBoer v. Snyder*, No. 14-571 (U.S. Feb. 27, 2015) 20, 23
Br. for Petitioners, *Obergefell v. Hodges*, No. 14-556 (U.S. Feb. 27, 2015) 20, 23, 30
Br. for Petitioners, *Tanco v. Haslam*, No. 14-562 (U.S. Feb. 27, 2015) 20, 23

TABLE OF AUTHORITIES—Continued

Page(s)

Br. of Idaho Governor C.L. "Butch" Otter, *DeBoer v. Snyder*, No. 14-556, 2014 WL 7405781 (U.S. Dec. 15, 2014) 4-5

Br. of Michigan Catholic Conference in Support of Appellants and Urging Reversal, *DeBoer v. Snyder*, No. 14-1341, 2014 WL 2154789 (6th Cir. May 14, 2014) 4

Br. of Public Advocate of the United States, et al. in Support of Appellants and Reversal, *DeBoer v. Snyder*, No. 14-1341, 2014 WL 2154791 (6th Cir. May 14, 2014) 3-4

Br. of The Becket Fund for Religious Liberty, *Tanco v. Haslam*, No. 14-5297, 2014 WL 2154836 (6th Cir. May 13, 2014) 5

Br. of United States Conference of Catholic Bishops, et al. in Support of Petitioners, *Herbert v. Kitchen*, No. 14-124, 2014 WL 4404770 (U.S. Sept. 4, 2014) 4

LEGISLATIVE MATERIALS

Hearing on H.J.R. 24, 104th Gen. Assemb., Reg. Sess. (Tenn. Feb. 16, 2005) 19

S. Debate, 108th Cong., 2nd Sess. (Ky. 2004) 17, 18

S. Rep. No. 872, 88th Cong., 2d Sess. (1964) 29-30

TABLE OF AUTHORITIES—Continued

Page(s)

Tax Exempt Status of Private Schools: Hearing Before the Subcomm. on Taxation & Debt Mgmt. Generally of the S. Comm. on Fin., 96th Cong., 1st Sess. (1979) 10

OTHER AUTHORITIES

American Family Association, *Who Is AFA*, *available at* http://www.afa.net/who-is-afa/our-mission/ (last visited March 2, 2015). 18

David S. Ariel, *What Do Jews Believe?: The Spiritual Foundations of Judaism* (1996) 26

Church of Jesus Christ of Latter-day Saints, *Interracial Marriage Discouraged*, Church News (June 17, 1978) 26

Citizens for Cmty. Values, *Marriage Declaration*, *available at* www.ccv.org/issues/homosexuality/marriage-declaration (last visited March 2, 2015) 18

W. Eskridge Jr., *Noah's Curse: How Religion Often Conflates Status, Belief & Conduct to Resist Antidiscrimination Norms*, 45 Ga. L. Rev. 657 (2010) .....*passim*

D. Fehrenbacher, *The Dred Scott Case: Its Significance in American Law & Politics* (1978) 6

TABLE OF AUTHORITIES—Continued

Page(s)

C. Hughes, *The Supreme Court of the United States* (1928) 12

Michael G. Lawler, *Marriage and the Catholic Church: Disputed Questions* (2002)..... 25

C. Lund, *In Defense of the Ministerial Exception*, 90 N.C. L. Rev. 1 (2011)..... 13

Rick Lyman, *Gay Couples File Suit After Michigan Denies Benefits*, N.Y. Times (Apr. 4, 2005)..... 18

L. McClain, *The Domain of Civic Virtue in a Good Society: Families, Schools & Sex Equality*, 69 Fordham L. Rev. 1617 (2001)..... 11

2 G. Myrdal, *et al.*, *An American Dilemma: The Negro Problem and Modern Democracy* (1944)..... 6

A. Padilla & J. Winrich, *Christianity, Feminism & the Law*, 1 Colum. J. Gender & L. 67 (1991)..... 11

Rep. Bill Dunn, Support the Marriage Amendment, Chattanoogan (Sept. 28, 2006)..... 19

Roman Catholic Church, *Catechism of the Catholic Church* (1995 ed.)..... 26, 27

Roman Catholic Church Code of Canon Law, 1917 Code C.1060 25

1983 Code C.1086 25-26

1983 Code C.1124 26

TABLE OF AUTHORITIES—Continued

Page(s)

6 J. Smith, *The Biblical & "Scientific" Defense of Slavery* (1993) 6

The Bible:

Deuteronomy 7:3 9

Ezra 9:1-3 9

First Corinthians 7:2 17

Genesis 1:27 4

Genesis 2:22-24 4

Genesis 28:1 9

Matthew 19:4-6 4

The First Presidency, *Statement on the Status of Blacks* (Dec. 15, 1969), *reproduced in* Appendix, *Neither White Nor Black: Mormon Scholars Confront the Race Issue in a Universal Church* (Lester E. Bush, Jr. & Armand L. Mauss eds., 1984) 27

U.S. Comm'n on Civil Rights, *Discriminatory Religious Schools & Tax Exempt Status* (1982) 10

E. Wendorff, *Employment Discrimination & Clergywomen: Where the Law Has Feared to Tread*, 3 Cal. Rev. L. & Women's Stud. 135 (1993) 13

INTEREST OF *AMICI* [1]

Amici curiae are a diverse group of religious, civil rights, and cultural organizations that advocate for religious freedom, tolerance, and equality. *Amici* have a strong interest in this case due to their commitment to religious liberty, civil rights, and equal protection of law. Identity and Interest Statements of particular *amici* can be found in the Appendix to this brief.

SUMMARY OF ARGUMENT

History shows us that some of this nation's most abhorrent laws and practices—laws and practices that are now considered anachronistic blemishes on our history—were grounded in and defended by religious and moral justifications. For three-quarters of a century, this Court has refused to uphold laws disadvantaging minority groups based on religious or moral disapproval alone—with the one, now-discredited exception of *Bowers v. Hardwick*, 478 U.S. 186 (1986). While Respondents largely shy away from explicitly embracing religious and moral justifications in support of Kentucky Const. § 233A, Michigan Const. art. I, § 25, Ohio Const. art. XV, § 11, and Tennessee Const. art. XI, § 18, their *amici* do not. And the legislative history and ballot initiative campaigns behind these marriage bans demonstrate that the bans had the specific—and improper—purpose of codifying a particular religious understanding of marriage into civil law and expressing moral disapproval of same-sex couples.

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[1] No counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund its preparation or submission. No person other than *amici* and their counsel made a monetary contribution to the preparation or submission of this brief.

This improper purpose renders the marriage bans unconstitutional under both the Establishment Clause and the Equal Protection Clause. Because the bans enshrine a particular religious viewpoint into law and lack a secular purpose, they necessarily run afoul of Establishment Clause principles. These Establishment Clause shortcomings buttress the unavoidable conclusion that the bans also violate the Equal Protection Clause. As this Court has held, moral- and religion-based disapproval does not qualify as a legitimate governmental interests sufficient to survive even the lowest levels of constitutional scrutiny.

Finally, contrary to the arguments of some who defend the marriage bans, invalidating the bans will not jeopardize religious liberty. As an initial matter, the cases before this Court concern whether same-sex couples are entitled to the benefits of *civil* marriage. Religious groups will remain free, as they always have been, to choose how to define religious marriage and which marriages to solemnize. To the extent that the "religious liberty" arguments take the form of concern regarding private entities' and individuals' potential future liability under a variety of different types of anti-discrimination laws, they are a red herring. Not only do such arguments erroneously conflate marriage equality laws with application of anti-discrimination laws, but they also reflect a profound misunderstanding of religious liberty. Religious liberty should serve as a shield, not as a sword to discriminate against members of a disadvantaged minority group.

ARGUMENT

I. RELIGIOUS AND MORAL DISAPPROVAL HAS HISTORICALLY BEEN AN UNSUSTAINABLE BASIS FOR JUSTIFYING LAWS DISADVANTAGING MINORITY GROUPS.

Proponents of laws that marginalize disadvantaged groups have long relied on arguments grounded in morality and religion to justify the discrimination. Time and again, however, society has come to see these laws as a stain on the nation's history and to view the religious and moral justifications offered for them as wrong, both spiritually and philosophically.

A. Respondents' *Amici* Advance Religious And Moral Justifications For Marriage Equality Bans.

Amici join in Petitioners' arguments exposing as fatuous—and necessarily irrational—the purportedly secular grounds consistently advanced by Respondents to justify Kentucky Const. § 233A, Michigan Const. art. I, § 25, Ohio Const. art. XV, § 11, and Tennessee Const. art. XI, § 18 (collectively, "marriage equality bans" or "marriage bans"). With those grounds set to the side, there is but one interest left to support marriage bans: religious and moral disapproval of marriage equality and, in some cases, of gay and lesbian people themselves.

Perhaps recognizing that this Court's precedent holds religious disapproval to be a constitutionally insufficient interest, Respondents shy away from explicitly endorsing it. Their *amici*, however, have had no such reservations. *See, e.g.*, Br. of Public Advocate of the United States, et al. in Support of Appellants

and Reversal, p. 31, *DeBoer v. Snyder*, No. 14-1341, 2014 WL 2154791, at *31 (6th Cir. May 14, 2014) ("That Creator made man in His own image, both male and female, and designed marriage for all mankind's benefit and protection as an institution between one man and one woman. *See, e.g.*, Genesis 1:27 and 2:22-24; Matthew 19:4-6."); Br. of Michigan Catholic Conference in Support of Appellants and Urging Reversal, p. 3, *DeBoer v. Snyder*, No. 14-1341, 2014 WL 2154789, at *3 (6th Cir. May 14, 2014) ("'Have you not read that He who created them from the beginning made them male and female, and said, for this reason a man shall leave his father and mother and be joined to his wife and the two shall become one flesh?' Matthew 19:4. The question Jesus posed informs the constitutional inquiry in this case."); *Id.* at *7 ("Only one male and one female can participate in the generative act of marriage consummation. Our Creator designed in nature the complimentary male and female reproductive organs for the ultimate unity essential to our survival – the creation of life."); Br. of United States Conference of Catholic Bishops, et al. in Support of Petitioners, p. 5, *Herbert v. Kitchen*, No. 14-124, 2014 WL 4404770, at *5 (U.S. Sept. 4, 2014) ("Marriage between a man and a woman is for us an article of faith and a profound social good. Our understanding of God's law, fortified by experience, confirms the centrality of marriage between a man and a woman as a foundational institution for protecting children and sustaining the American scheme of ordered liberty.").

Some among Respondents' *amici* have offered a twist on the religious-moral rationale for marriage bans: They express concern for the religious liberty of those who disapprove of marriage equality on religious grounds. *See, e.g.*, Br. of Idaho Governor C.L. "Butch"

Otter, p. 21, *DeBoer v. Snyder*, No. 14-556, 2014 WL 7405781, at *21 (U.S. Dec. 15, 2014) (urging this Court to consider using *Otter v. Latta*, 771 F.3d 456 (9th Cir. 2014), as a vehicle to resolve "the constitutionality of man-woman marriage laws," citing it as the "only pending cases [sic] in which public officials defended such laws based in part on the need to limit the risk of incursions into religious liberty"); Br. of The Becket Fund for Religious Liberty, p. 4, *Tanco v. Haslam*, No. 14-5297, 2014 WL 2154836, at *4 (6th Cir. May 13, 2014) ("Recognizing a constitutional right to same-sex marriage without simultaneously protecting conscience rights will trigger threats to the religious liberty of people and organizations who cannot, as a matter of conscience, treat same-sex unions as the moral equivalent of opposite-sex marriage.").

As history teaches, this kind of religious and moral disapproval cannot legitimize unequal treatment of disadvantaged groups.

B. Laws Disadvantaging Minority Groups Have Historically Been Justified By Religious And Moral Disapproval.

Throughout American history, the pattern is clear: Laws that now seem preposterous were defended—and, in many cases, extolled—in their day on grounds of religious and moral disapproval. These examples should sound a cautionary note when religious and moral disapproval are proffered as rationales for unequal treatment under the law.

1. Slavery provides a striking example. From the colonial period until the ratification of the Thirteenth Amendment, supporters of slavery frequently relied on scripture not only to deflect abolitionist concerns but also to insist that slavery was a moral *good*—a

central part of God's plan. *See* W. Eskridge Jr., *Noah's Curse: How Religion Often Conflates Status, Belief & Conduct to Resist Antidiscrimination Norms*, 45 Ga. L. Rev. 657, 666-67 (2010). Slavery supporters prominently argued, for example, that "'the Negro was a heathen and a barbarian, an outcast among the peoples of the earth, a descendant of Noah's son Ham, cursed by God himself and doomed to be a servant forever on account of an ancient sin.'" D. Fehrenbacher, *The Dred Scott Case: Its Significance in American Law & Politics* 12 (1978) (quoting 2 G. Myrdal, *et al.*, *An American Dilemma: The Negro Problem and Modern Democracy* 85 (1944)). A related theory held that "negroes were human but that unlike whites they were not created in the image of God and [were] one of several inferior races created by God after Adam." 6 J. Smith, *The Biblical & "Scientific" Defense of Slavery* xxv-xxvi (1993). Defenders of slavery also emphasized "that God's Chosen (Abraham, Isaac, and Jacob) owned slaves and that Leviticus required the Israelites to secure 'bondsmen' from among the 'heathen' surrounding Israel" that were to be "inherit[ed] * * * for a possession." Eskridge, *supra*, at 667.

This scriptural justification was not embraced by extremist sects alone. To the contrary, it represented the dominant viewpoint of nearly every major religious group in the United States during this period. In fact, when abolitionists began to mount challenges to slavery, clergymen of all denominational stripes were among the institution's most ardent defenders. *Id.* at 669. And following Lincoln's Emancipation Proclamation, ninety-six religious leaders from eleven different denominations issued a proclamation of their own, entitled "An Address to

Christians Throughout the World," demanding the preservation of slavery. *Id.*

The biblical defense of slavery gained currency within the judicial sphere as well. For example, in *Scott v. Emerson*, 15 Mo. 576 (Mo. 1852), the Missouri Supreme Court counseled:

> When the condition of our slaves is contrasted with the state of their miserable race in Africa; when their civilization, intelligence, and instruction in religious truths are considered * * * we are almost persuaded, that the introduction of slavery amongst us was, in the providence of God * * * a means of placing that unhappy race within the pale of civilized nations.

Id. at 587. Indeed, even this Court accepted a religiously-rooted notion of African-Americans as inferior, noting that that inferiority "was regarded as an axiom in morals as well as in politics, which no one thought of disputing[.]" *Dred Scott v. Sandford*, 60 U.S. 393, 407 (1857).

2. The Thirteenth Amendment did not put an end to religious and moral justifications for African-American subjugation. Instead, those opposed to equal rights for former slaves simply modified their reading of scripture: If the Bible no longer could be read to condone slavery, it could at least be read to mandate segregation. Eskridge, *supra*, at 694. The theories of Reverend Benjamin Morgan Palmer, leader of the Southern Presbyterian Church, provide a telling example. Proponents of segregation argued that the Bible should be interpreted as teaching that Africans descended from Ham. Palmer theorized that since Ham's grandson Nimrod built the Tower of Babel, and God reacted by scattering the tower's builders "'abroad

from thence upon the face of all the earth,'" God would do the same thing again if Ham's current descendants challenged segregation: "[I]f arrogant descendants of Ham * * * sought to disrupt the divine plan for segregation of the races, the Lord would thwart those plans through divine dispersion that reaffirmed the original design." *Id.* at 669-70. Southern whites relied on this and other "modernized" distortions of scripture to advocate a "'right not to associate' with black people." *Id.* at 669.

Just as with slavery, these arguments gained widespread acceptance, including within the judiciary. In *West Chester & Philadelphia Railroad Co. v. Miles*, 55 Pa. 209 (Pa. 1867), the Pennsylvania Supreme Court opined that "following the order of Divine Providence, human authority ought not to compel these widely separated races to intermix." *Id.* at 213. The legal basis for segregation followed: "When, therefore, we declare a right to maintain separate relations as far as is reasonably practicable, but in a spirit of kindness and charity, and with due regard to equality of rights, it is not prejudice, nor caste, nor injustice of any kind, but simply to suffer men to follow the law of races established by the Creator himself[.]" *Id.* at 214. This passage was cited repeatedly by other courts as a basis for upholding Jim Crow laws. *See, e.g.*, *Berea College v. Commonwealth*, 29 Ky. L. Rptr. 284 (Ky. 1906); *Bowie v. Birmingham Ry. & Elec. Co.*, 125 Ala. 397, 408-09 (1900); *State v. Gibson*, 36 Ind. 389 (1871).

3. Segregationist arguments grounded in religion and morality were perhaps most ubiquitous in the struggle against interracial marriage. Seizing on this Court's pronouncement that marriage "ha[s] more to do with the morals and civilization of a people than any other institution," *Maynard v. Hill*, 125 U.S. 190,

205 (1888), opponents of interracial marriage relied on scripture to argue that marriage between the races was immoral and a contravention of God's word. They cited to numerous biblical passages to justify their position, including Deuteronomy 7:3 (instructing the Israelites not to marry members of other tribes); Ezra 9:1-3 (discussing the "abominations" of marrying members of other nations); and Genesis 28:1 (describing Isaac's instruction to Jacob not to "take a wife of the daughters of Canaan," *i.e.*, purportedly of African descent). *See* Eskridge, *supra*, at 673 n. 79, 675.

Again, these beliefs found their way into scores of judicial opinions upholding bans on interracial marriage. In *Kinney v. Commonwealth*, 71 Va. 858 (1878), for example, the Virginia Supreme Court held that "[t]he purity of public morals, the moral and physical development of both races, and the highest advancement of our cherished southern civilization" all required that the races "be kept distinct and separate, and that connections and alliances so unnatural that God and nature seem to forbid them, should be prohibited by positive law, and be subject to no evasion." *Id.* at 869. Likewise, in *Green v. State*, 58 Ala. 190 (1877), the Alabama Supreme Court wrote: "[S]urely there can not be any tyranny or injustice in requiring both [blacks and whites] alike, to form this union with those of their own race only, whom God hath joined together by indelible peculiarities, which declare He has made the two races distinct." *Id.* at 195. *See, e.g.*, *Scott v. State*, 39 Ga. 321, 326 (1869); *Miles*, 55 Pa. at 213.

Perhaps most notoriously, a Virginia trial court held in the mid-1960s—in a decision later overturned by this Court—that Virginia's prohibition on interracial

marriage fulfilled God's Word. "Almighty God created the races white, black, yellow, malay and red, and he placed them on separate continents." *Loving v. Virginia*, 388 U.S. 1, 3 (1967) (citing trial court opinion). "And but for the interference with his arrangement there would be no cause for such marriages. The fact that he separated the races shows that he did not intend for the races to mix." *Id.*

Such beliefs maintained a robust following well into the second half of the twentieth century. *See id.*; *see also State ex rel. Hawkins v. Board of Control*, 83 So.2d 20, 27-28 (Fla. 1955) (Terrell, J., concurring) (asserting that "segregation is not a new philosophy generated by the states" but rather part of "God's plan").

As laws supporting segregation began to fall, the arguments for segregation shifted; they began to focus more on religious liberty and associational freedom for white Christians who did not wish to associate with non-whites. *See* Eskridge, *supra*, at 672-74. After this Court struck down the "separate but equal" doctrine in *Brown v. Board of Education*, 347 U.S. 483 (1954), Southern churches created religious academies so white Christians would not have to attend desegregated schools. *See* U.S. Comm'n on Civil Rights, *Discriminatory Religious Schools & Tax Exempt Status* 1 (1982). When the Treasury Department removed those schools' tax-exempt designations, Southern fundamentalists protested that the government was infringing on their religious liberty to run segregated schools as the Bible demanded. *See Tax Exempt Status of Private Schools: Hearing Before the Subcomm. on Taxation & Debt Mgmt. Generally of the S. Comm. on Fin.*, 96th Cong., 1st Sess. 18 (1979). Bob Jones University made the same argument before this Court

in defending its racially discriminatory admissions policy as late as 1983. *See Bob Jones Univ. v. United States*, 461 U.S. 574, 602-603 (1983). And private parties continued to assert their religious beliefs as a legal justification for private discrimination long after this Court's ruling in *Brown*. *See, e.g., Newman v. Piggie Park Enterprises, Inc.*, 256 F. Supp. 941, 945 (D.S.C. 1966) (owner of restaurant chain asserted his religious beliefs opposing racial integration as a rationale for his refusal to serve black patrons), *aff'd in relevant part and rev'd in part on other grounds*, 377 F.2d 433 (4th Cir. 1967), *aff'd and modified on other grounds*, 390 U.S. 400 (1968).

4. Similar arguments grounded in religion and morality were advanced to support laws discriminating against women. *See* A. Padilla & J. Winrich, *Christianity, Feminism & the Law*, 1 Colum. J. Gender & L. 67, 75-86 (1991). As one scholar has noted: "There is assumed to be a literal scriptural foundation for a patriarchal family governance structure of husband as 'head' of the household," with his "wife as caregiver/homemaker and submissive or deferential to the husband's authority." L. McClain, *The Domain of Civic Virtue in a Good Society: Families, Schools & Sex Equality*, 69 Fordham L. Rev. 1617, 1643 (2001).

As with race, this belief structure influenced judicial decision-making. In *Bradwell v. Illinois*, 83 U.S. 130 (1873), for example, a member of this Court opined that Illinois could deny women admission to the state bar because "[t]he natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life." *Id.* at 141 (Bradley, J., concurring). An argument that it was preordained by God for women to be homemakers (not

lawyers) provided the foundation for this view: "The constitution of the family organization, which is founded in the divine ordinance, as well as in the nature of things, indicates the domestic sphere as that which properly belongs to the domain and functions of womanhood. * * * The paramount destiny and mission of woman are to fulfill the noble and benign offices of wife and mother. This is the law of the Creator." *Id.*

C. Religious and Moral Justifications For Unequal Treatment Have Been Abandoned And Opinions Upholding Them Are Viewed As Anachronistic Blemishes.

The discriminatory laws catalogued above have been universally repudiated. This Court rejected anti-miscegenation laws in *Loving*. It rejected segregation in *Brown*. It has repudiated opinions upholding racially discriminatory laws that rested on moral and religious disapproval. *See, e.g., South Carolina v. Regan*, 465 U.S. 367, 412 n. 10 (1984) (*quoting* C. Hughes, *The Supreme Court of the United States* 50 (1928)) (referring to *Dred Scott* as one of "three notable instances [in which] the Court has suffered severely from self-inflicted wounds"). And the Court over the past four decades has rejected earlier, religion-driven views regarding the place of women in society. In *Mississippi University for Women v. Hogan*, 458 U.S. 718 (1982), for example, the Court held that any test for determining the validity of gender-based classifications "must be applied free of fixed notions concerning the roles and abilities of males and females." *Id.* at 724-25. Similarly, in *Frontiero v. Richardson*, 411 U.S. 677 (1973), the Court, repudiating Justice Bradley's

concurrence in *Bradwell*, noted the "long and unfortunate history of sex discrimination" in America. *Id.* at 684.

Tellingly, as societal support for discrimination has ebbed, the religious and moral disapproval that undergirded that discrimination has *itself* receded. After the Civil War, clergymen modified their interpretation of scripture so that the Bible endorsed segregation instead of slavery. *See* § I.B.2, *supra*. Likewise, the 1960s witnessed all of the major Protestant denominations "abandon[ ] the racist renderings of the biblical stories about Noah, Ham, Canaan, Nimrod, Isaac, and Jacob" altogether. Eskridge, *supra*, at 681. And many religious groups have embraced the precise opposite of their old approach to women's rights. Many Protestant churches, for example, now ordain women and embrace gender-neutral policies, *see* C. Lund, *In Defense of the Ministerial Exception*, 90 N.C. L. Rev. 1, 44 (2011), and have introduced programs to address discrimination against women within the church, *see* E. Wendorff, *Employment Discrimination & Clergywomen: Where the Law Has Feared to Tread*, 3 Cal. Rev. L. & Women's Stud. 135, 140 (1993).

This shift is just the latest incarnation of a recurring national dynamic: Religious justifications for discriminatory laws vanish as popular support for those forms of discrimination fades.

II. MARRIAGE BANS VIOLATE THE ESTABLISHMENT AND EQUAL PROTECTION CLAUSES BECAUSE THEY WERE ENACTED WITH THE PURPOSE OF IMPOSING A PARTICULAR RELIGIOUS UNDERSTANDING OF MARRIAGE AS LAW AND EXPRESSING MORAL DISAPPROVAL.

The same type of religious and moral disapproval that has historically been an unsustainable basis for justifying laws disadvantaging minority groups renders the marriage equality bans that are before the Court unconstitutional under the Establishment Clause and Equal Protection Clause. The bans run afoul of Establishment Clause principles because they impermissibly have a primarily religious purpose—to write one particular religious understanding of marriage into the law—and lack any secular purpose. Similarly, because moral and religious disapproval of marriage for same-sex couples does not constitute a legitimate governmental interest, the marriage bans cannot survive Equal Protection Clause analysis.

A. The Establishment Clause Prohibits Laws That Lack A Secular Purpose And Have The Primary Purpose Or Effect Of Advancing One Religious View Over Others.

States cannot, consistent with the Establishment Clause, enact laws for the exclusive or primary purpose of promoting a religious viewpoint. The "touchstone" of the Establishment Clause "is the principle that the 'First Amendment mandates governmental neutrality between religion and religion, and between religion and nonreligion.'" *McCreary*

County, Kentucky v. Am. Civil Liberties Union of Kentucky, 545 U.S. 844, 860 (2005) (*quoting Epperson v. Arkansas*, 393 U.S. 97, 104 (1968)). "The design of the Constitution is that preservation and transmission of religious beliefs and worship is a responsibility and a choice committed to the private sphere." *Lee v. Weisman*, 505 U.S. 577, 589 (1992). To that end, "all creeds must be tolerated and none favored." *Id.* at 590; *see also Larson v. Valente*, 456 U.S. 228, 244 (1982) ("The clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another.").

This requirement of governmental neutrality with respect to religion arose from the country's foundational principle of affording maximum liberty to all religions to exercise their faiths in freedom. *See Larson*, 456 U.S. at 244 ("Madison's vision—freedom for all religion being guaranteed by free competition between religions—naturally assumed that every denomination would be equally at liberty to exercise and propagate its beliefs.").

"[I]n light of its history and the evils it was designed forever to suppress," this Court has consistently given the Establishment Clause "broad meaning." *Everson v. Bd. of Educ. of Ewing Twp.*, 330 U.S. 1, 14-15 (1947). The Court has invalidated laws that aid one particular religion. *Id.* at 15-16 ("Neither a state nor the Federal Government can ... pass laws which aid one religion, aid all religions, or prefer one religion over another."). It has also rejected any law that has the purpose or primary effect of advancing certain religious denominations over others or advancing religious over non-religious beliefs. *See, e.g., Larson*, 456 U.S. at 244, 247 (invalidating a law that distinguished between religious organizations

based on how they collected funds because it "clearly grant[ed] denominational preferences"); *Edwards v. Aguillard*, 482 U.S. 578 (1987) (holding law requiring teaching of creationism when evolution is taught unconstitutional because it lacked a secular purpose). The Establishment Clause "forbids alike preference of a religious doctrine or the prohibition of theory which is deemed antagonistic to a particular dogma." *Epperson v. Arkansas*, 393 U.S. 97, 103, 106 (1968) (striking down state ban on teaching evolution in public schools where the "sole reason" for the law was that evolution was "deemed to conflict with a particular religious doctrine").

Thus, even when a civil law lacks an overtly religious message or provision, it still violates the Establishment Clause if it advances a specific religious preference or belief disconnected from a secular purpose. In *Lemon v. Kurtzman*, 403 U.S. 602 (1971), this Court distilled these principles into a test that remains instructive: A law must have a secular purpose; its primary effect cannot be to advance or inhibit religion; and it must not result in excessive governmental entanglement with religion. *Id.* at 622.

Relevant here is the secular purpose requirement. This Court has discussed this rule at length, noting that "the secular purpose required has to be genuine, not a sham, and not merely secondary to a religious objective." *McCreary*, 545 U.S. at 864. The Court has emphasized that this test has "bite," such that a law will not survive scrutiny under the Establishment Clause simply because "some secular purpose" is constructed after the fact. *Id.* at 865 & n.13.

To be clear, religious values can play an important role in the formation of some individuals' public policy preferences. For example, numerous laws restricting

or prohibiting the sale and consumption of alcohol exist throughout the United States. *See, e.g.*, Ky. Rev. Stat. § 242.185 (permitting dry counties); 23 U.S.C. § 158 (National Minimum Drinking Age Act of 1984). Yet even though religious and moral understandings likely played a part in the decisions of some law-makers to pass such laws, alcohol restrictions and prohibitions also have legitimate, secular purposes—for example, preventing driving deaths or protecting children from addiction—and their primary effect is to advance these governmental interests, not religion. *See, e.g., Cathy's Tap, Inc. v. Village of Mapleton*, 65 F. Supp.2d 874, 892 (C.D. Ill. 1999) (holding that city ordinances prohibiting live nude dancing and sale of liquor in conjunction with nude dancing did not violate Establishment Clause in light of "plausible secular purpose of combating the combustible mixture of alcohol and nudity").

Conversely the marriage bans have no legitimate secular purpose. The records of the legislative and ballot-campaign proceedings that resulted in the bans make clear that religious condemnation of marriage equality was the primary reason for their enactment. This religious purpose is confirmed by the histories of the marriage bans, which were presented on explicitly religious grounds. For example, the lead legislative sponsor of the senate bill placing Kentucky's constitutional marriage ban on the ballot referred to marriage as a "divine institution designed to form a permanent union between man and woman." S. Debate, 108th Cong., 2nd Sess. (Ky. 2004). He quoted scripture at length and asserted that First Corinthians 7:2 describes what he terms "the most sacred relationship of life" as between a man and "his own wife" and a woman and "her own husband." *Id.* He argued that the Amendment ought to be adopted to

protect "the sacred institution of marriage join[ing] together a man and a woman for the stability of society and for the greater glory of God." *Id.*

Similarly, the lead organization spearheading the public petition drive to put the Ohio marriage ban on the ballot explained the purpose of the law in religious terms, stating, "When same-sex 'marriage' is legal within a state ... [t]he traditional God-designed definition of marriage is trivialized. ... It cannot coexist with religious freedoms." Citizens for Cmty. Values, *Marriage Declaration*, *available at* www.ccv.org/issues/homosexuality/marriage-declaration (last visited March 2, 2015).

In Michigan, the president of the American Family Association of Michigan ("AFA-Michigan"), one of the Michigan marriage ban's co-authors and a leading advocate in favor of its passage, expressed a similar religious purpose. *See* Rick Lyman, *Gay Couples File Suit After Michigan Denies Benefits*, N.Y. Times A16 (Apr. 4, 2005) (noting that AFA-Michigan president Gary Glenn was a "spearhead" of the Amendment who advocated that "marriage between one man and one woman be given special recognition, special incentives and special protection under the law"). AFA-Michigan is a state affiliate of the national nonprofit American Family Association ("AFA"), whose Philosophical Statement declares that AFA "believes that God has communicated absolute truth to mankind, and that all people are subject to the authority of God's Word at all times." American Family Association, *Who Is AFA*, *available at* http://www.afa.net/who-is-afa/our-mission/ (last visited March 2, 2015). AFA's organizational activism is directed to, inter alia, the "[p]reservation of [m]arriage and the [f]amily." *Id.*

And the lead legislative proponent of the Tennessee marriage ban, quoting the Bible, wrote in support of his constitutional amendment: "'For this reason, a man leaves his mother and father and clings to his wife, and the two become one.' When Jesus spoke these words, He observed what people had known for thousands of years before and for 2,000 years since—marriage is between a man and a woman. . . . Anything else is a lie." *Rep. Bill Dunn, Support the Marriage Amendment*, Chattanoogan (Sept. 28, 2006). *See also* Hearing on H.J.R. 24, 104th Gen. Assemb., Reg. Sess. (Tenn. Feb. 16, 2005) (Rep. Johnny Shaw) ("God said that marriage is between a man and a woman and that's good enough for me.").

Indeed, as measured at the time of enactment, these bans had no purpose or effect at all except to express a particular religious viewpoint. The four states that enacted the state constitutional marriage bans at issue here all already had in place statutes precluding same-sex couples from civil marriage. *See* Ky. Rev. Stat. § 402.005 (1998); Mich. Comp. Laws § 551.1 (1996); Ohio Rev. Code § 3101.01 (2004); Tenn. Code Ann. § 36-3-113(a) (1996). The only cognizable impetus for the states' invidious bans, therefore, was the desire of certain individuals and religious organizations to enshrine in the state constitution a particular religious understanding of marriage and to insulate it from challenge.

In the religious sphere, even among adherents of Christianity, there was (and continues to be) considerable debate about how religion should treat marriages of same-sex couples. The primary purpose of the marriage bans was to take sides in this religious debate by putting the full force of the state behind an express moral and religious condemnation of a

vulnerable minority—gay men and lesbians. The restriction of marriage to different-sex couples was thus a quintessential misuse of governmental power to promote a particular religious view, with no legitimate secular purpose. The bans are therefore unconstitutional under the Establishment Clause.

B. "Moral Disapproval" Does Not Constitute A Legitimate State Interest, And Therefore The Marriage Bans Also Violate The Equal Protection Clause.

The marriage bans' Establishment Clause deficiencies support the conclusion that the bans also violate the Equal Protection Clause. Morality and religion play an important role in the lives of many Americans, and many are undoubtedly guided in their voting by personal religious and moral beliefs. But to be constitutional under the Supreme Court's decisions in *Lawrence v. Texas*, 539 U.S. 558 (2003), *United States v. Windsor*, 570 U.S. ___, 133 S. Ct. 2675 (2013), and earlier cases, a law must be, at minimum, rationally related to a legitimate governmental interest.[2] Moral disapproval does not qualify as a legitimate interest. The marriage bans therefore lack any legitimate purpose.

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[2] *Amici* support the Petitioners' position that marriage bans should be scrutinized under a heightened level of review. *See* Br. for Petitioners, Sec. III, *Tanco v. Haslam*, No. 14-562 (U.S. Feb. 27, 2015); Br. for Petitioners, Sec. I.B.2, *Bourke v. Beshear*, No. 14-574 (U.S. Feb. 27, 2015); Br. for Petitioners, Sec. II.B, *DeBoer v. Snyder*, No. 14-571 (U.S. Feb. 27, 2015); Br. for Petitioners, Sec. II and III, *Obergefell v. Hodges*, No. 14-556 (U.S. Feb. 27, 2015). However, this brief analyzes the issue under rational basis review to show that the marriage bans cannot withstand even the lowest level of constitutional review, much less heightened scrutiny.

The Court held in *Lawrence* that "the fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice." 539 U.S. at 577 (quoting *Bowers v. Hardwick*, 478 U.S. 186, 216 (1986) (Stevens, J., dissenting)) (internal quotation marks omitted). Justice O'Connor observed in her *Lawrence* concurrence that "[m]oral disapproval of [a particular group], like a bare desire to harm the group, is an interest that is insufficient to satisfy rational basis review under the Equal Protection Clause." 539 U.S. at 582. Justice O'Connor further observed that the Court had "never held that moral disapproval, without any other asserted state interest, is a sufficient rationale under the Equal Protection Clause to justify a law that discriminates among groups of persons." *Id.*

In *Windsor*, this Court found that Section 3 of the federal Defense of Marriage Act—by which Congress excluded married same-sex couples from over 1,100 federal rights, benefits, and obligations—had the impermissible purpose of expressing moral condemnation against gay men and lesbians by demeaning the integrity of their relationships, as well as by expressing "animus" and a "bare ... desire to harm a politically unpopular group." 133 S. Ct. at 2693-95. The Court held that this purpose was unconstitutional based on the equal protection guarantees of the Fifth Amendment. *Id.* The marriage bans at issue in this case are no different.

Lawrence and *Windsor* are just the latest cases where this Court invalidated laws reflecting a "bare ... desire to harm a politically unpopular group." *See Romer v. Evans*, 517 U.S. 620, 634-35 (1996) (altera-

tion in original) (citation omitted) (finding constitutional amendment banning gays and lesbians from receiving nondiscrimination protections in any local jurisdiction was motivated by animus and moral disapproval, and therefore unconstitutional under the equal protection clause); *U.S. Dep't of Agric. v. Moreno*, 413 U.S. 528, 534 (1973) (finding law targeting hippies unconstitutional under equal protection clause). In these cases, this Court properly stripped away the *post-hoc* rationales proffered and concluded that "animus," "negative attitudes," "unease," "fear," bias," or "unpopular[ity]" had actually motivated the legislative actions at issue. *Windsor*, 133 S. Ct. at 2693-95; *Lawrence*, 539 U.S. at 582; *Romer*, 517 U.S. at 634-35; *Moreno*, 413 U.S. at 534.

Underlying these decisions is an awareness by this Court that allowing condemnation of a politically unpopular group to constitute a legitimate governmental interest would effectively eviscerate the Equal Protection guarantees of the Fifth and Fourteenth Amendments. Accordingly, this Court has consistently rejected moral condemnation as a governmental interest. *See also Loving*, 388 U.S. at 3 (striking down anti-miscegenation law after trial judge invoked God's separation of the races).

As described above, statements of purpose made throughout the legislative and public-ballot efforts to pass the marriage bans—and the absence of any cognizable secular purpose—demonstrate their purpose of preserving and codifying into civil law a particular religious "ideal" of marriage and condemning a type of marriage that does not fit that ideal. The bans' proponents were motivated by a desire to impose religious and moral condemnation on a minority, as in *Moreno* (hippies) and *Romer* (gay men and lesbians).

This purpose is improper under both the Establishment Clause and the Equal Protection Clause.

There is no legitimate governmental interest that would justify a state's defining marriage to exclude same-sex couples. Respondents and their *amici* have proposed numerous interests to justify the bans, but as Petitioners' briefs explain, these professed interests are shams. *See* Br. for Petitioners, pp. 47-57, *Tanco v. Haslam*, No. 14-562 (U.S. Feb. 27, 2015); Br. for Petitioners, pp. 39-51, *Bourke v. Beshear*, No. 14-574 (U.S. Feb. 27, 2015); Br. for Petitioners, pp. 34-45, *DeBoer v. Snyder*, No. 14-571 (U.S. Feb. 27, 2015); Br. for Petitioners, pp. 50-59, *Obergefell v. Hodges*, No. 14-556 (U.S. Feb. 27, 2015). What remains once these claimed interests are rejected is clear from the record: a bare desire by the interest groups sponsoring the bans to codify a particular religious view into civil law, and to express their moral- and religion-based condemnation of gay and lesbian people. Under both the Establishment Clause and the Equal Protection Clause, the bans are therefore unconstitutional.

III. A DECISION INVALIDATING THE MARRIAGE BANS WOULD NOT THREATEN RELIGIOUS LIBERTY.

No one's religious liberty would be threatened by overturning the marriage bans before the Court. As an initial matter, the questions before this Court pertain to state licensing and recognition of marriage as a civil institution, not solemnization of marriage as a religious sacrament. No one seriously contends that the recognition of same-sex couples' equal right to marry civilly will force a change in religious doctrine or require churches and clergy to solemnize particular marriages against their beliefs. Indeed, the First

Amendment protects the right of religious groups and their adherents to make their own rules regarding the religious solemnization of marriages.

Proponents of marriage bans have argued that if same-sex couples could marry, churches, private businesses, schools, teachers, and counselors (among others) would see their religious freedoms curtailed, face discrimination lawsuits, and risk losing governmental benefits. This parade of horribles is a red herring. Marriage equality—the issue presently before the Court—is separate and distinct from application of anti-discrimination laws. Moreover, such "religious liberty" arguments reflect a profound misunderstanding of the purpose and meaning of religious liberty. Religious liberty should operate as a shield, not as a sword to discriminate against members of a disadvantaged minority group. Arguments to the contrary only serve to highlight that proponents of marriage bans have impermissibly selected one particular religious understanding of marriage as deserving of "religious liberty" protection—a religious preference that violates both the Establishment and Equal Protection Clauses.

A. Civil Marriage Is Distinct From, And Does Not Affect, Religious Marriage.

In the United States, civil marriage is a separate institution from, and does not mirror the requirements of, religious marriage. Civil marriage equality will not affect religious marriage, nor will it infringe on religious institutions' abilities to determine which marriages to solemnize. Under our constitutional scheme, religious groups have a fundamental right to adopt and modify requirements for marriage within their own religious communities. But they do not have

the right to impose their particular religious views onto the institution of civil marriage. Many religious groups have, in fact, historically recognized the benefit inherent in ensuring that their own rules on marriage are distinct from those embodied in civil law, leaving them the autonomy to determine which marriages to solemnize and under what circumstances. For example, though atheists have the same right to civil marriage as people who adhere to religious beliefs, their possession of that right poses absolutely no threat to religious marriage traditions, nor does it cheapen or abrogate the institution of marriage. And, as discussed below, civil marriage has long included interracial couples, couples of different faiths, and couples with prior divorces, and at no point has this "open tent" approach impinged on religious liberty. Houses of worship have continued to practice their marriage rituals without facing legal liability for refusing to consecrate certain kinds of marriages and without losing their tax-exempt status. A review of practices surrounding interfaith, interracial, and post-divorce marriage illustrates the diversity of religious views of marriage and the tradition of separating such views from civil law.

Interfaith Marriage: Some churches historically prohibited (and some continue to prohibit) interfaith marriage, while others accept it. For example, the Roman Catholic Church's Code of Canon Law proscribed interfaith marriage for most of the twentieth century. Michael G. Lawler, *Marriage and the Catholic Church: Disputed Questions* 118-19 (2002) (quoting 1917 Code C.1060). Although this restriction was relaxed in 1983, modern Catholic doctrine still requires the Church's "express permission" to marry a non-Catholic Christian and "express dispensation" to marry a non-Christian. 1983 Code

C.1086, 1124; Roman Catholic Church, *Catechism of the Catholic Church* 1635 (1995 ed.). Similarly, Orthodox and Conservative Jewish traditions both tend to proscribe interfaith marriage, *see* David S. Ariel, *What Do Jews Believe?: The Spiritual Foundations of Judaism* 129 (1996), as do many interpretations of Islamic law, *see Bandari v. INS*, 227 F.3d 1160, 1163-64 (9th Cir. 2000) (Iran's official interpretation of Islamic law forbids interfaith marriage and dating).

Despite these religious marriage prohibitions, American civil law has not restricted or limited marriage to couples of the same faith, and doing so would be patently unconstitutional. *See Epperson v. Arkansas*, 393 U.S. 97, 104 (1968) ("The First Amendment mandates governmental neutrality between religion and religion, and between religion and nonreligion."); *cf. Bandari*, 227 F.3d at 1168 ("[P]ersecution aimed at stamping out an interfaith marriage is without question persecution on account of religion.") (citation and internal quotation marks omitted).

Interracial Marriage: As with interfaith marriage, religious institutions in the past have differed markedly in their treatment of interracial relationships. For example, some churches previously condemned interracial marriage. *See Bob Jones Univ. v. United States*, 461 U.S. 574, 580-81 (1983) (fundamentalist Christian university believed that "the Bible forbids interracial dating and marriage").

In the past, the Church of Jesus Christ of Latter-day Saints discouraged interracial marriage. *See Interracial Marriage Discouraged*, Church News 2 (June 17, 1978) ("Now, the brethren feel that it is not the wisest thing to cross racial lines in dating and marrying.")

(quoting President Spencer W. Kimball in a 1965 address to students at Brigham Young University). Yet, in the context of its policy on excluding African-Americans from the priesthood, the Church expressly recognized that its position on treatment of African-Americans was "wholly within the category of religion," applying only to those who joined the church, with "no bearing upon matters of civil rights." The First Presidency, *Statement on the Status of Blacks* (Dec. 15, 1969), *reproduced in* Appendix, *Neither White Nor Black: Mormon Scholars Confront the Race Issue in a Universal Church* (Lester E. Bush, Jr. & Armand L. Mauss eds., 1984).

Similarly, religious views regarding interracial marriage do not dictate the terms of civil marriage. As this Court held in *Loving*, such religious proscriptions cannot, consistent with the Constitution, be codified in state law. 388 U.S. at 11.

Marriage Following Divorce: Finally, the Catholic Church does not recognize marriages of those who divorce and remarry, viewing those marriages as "objectively contraven[ing] God's law." *Catechism of the Catholic Church* 1650, 2384. However, civil law has not reflected this position, and passing a law that did so would interfere with the fundamental right to marry. *See Boddie v. Connecticut*, 401 U.S. 371 (1971).

* * *

In all three instances discussed above, individual religious groups have adopted particular rules relating to marriage, yet those rules do not dictate the contours of civil marriage law. At the same time, the religious groups that have followed those rules have been able to keep and maintain them internally, due to our country's long tradition of separation between church

and state. For some of these religious groups to now advocate for a religion-based understanding of marriage to be imposed on all people throughout their states smacks of a hypocritical double standard.

B. Marriage Equality Is A Separate And Distinct Issue From Anti-Discrimination Laws.

In past marriage-equality cases, parties and *amici* defending marriage bans have erroneously conflated marriage equality with application of anti-discrimination laws. Such arguments regarding potential liability under a variety of different types of anti-discrimination laws are a red herring. Those who make such arguments actually take issue with the anti-discrimination laws themselves, not with the legal definition of marriage.

Additionally, the vendors supposedly at risk of facing discrimination lawsuits would not be newly exposed to litigation by invalidation of marriage bans, because same-sex couples have long had unofficial religious and non-religious marriage ceremonies throughout the country. For example, one such lawsuit that gained national attention arose from a "commitment ceremony" in 2006 in a state that did not at the time afford any legal recognition to same-sex couples' unions. *See Elane Photography, LLC v. Willock*, 309 P.3d 53, 59 (N.M. 2013), *cert. denied*, 134 S. Ct. (2014).

Regardless of whether the ceremonies are official, vendors have been—and will continue to be—subject to any applicable anti-discrimination laws just as they would be if they refused to provide service for an interfaith couple or an interracial couple. Allowing the ceremonies to be official civil marriage ceremonies—

though important for the couple—will make no difference whatsoever to any vendor's pre-existing obligation to comply with anti-discrimination laws.

C. Commercial Businesses Have No Constitutional Right To Discriminate.

A business that avails itself of the benefits of doing business with the public must be subject to the public's rules for conducting that business. "The Constitution does not guarantee a right to choose employees, customers, suppliers, or those with whom one engages in simple commercial transactions, without restraint from the State." *Roberts v. U.S. Jaycees*, 468 U.S. 609, 634 (1984) (O'Connor, J., concurring). Indeed, it is a fundamental principle of public accommodations law that when a business chooses to solicit customers from the general public, it relinquishes autonomy over whom to serve. *Bell v. Maryland*, 378 U.S. 226, 314-15 (1964) (Goldberg, J., concurring) (quoting *Marsh v. Alabama*, 326 U.S. 501, 506 (1946)). As the Supreme Court of Nebraska explained in one of the earliest public accommodation decisions, "a barber, by opening a shop, and putting out his sign, thereby invites every orderly and well-behaved person who may desire his services to enter his shop during business hours. The statute will not permit him to say to one: 'You are a slave, or a son of a slave; therefore I will not shave you.'" *Messenger v. State*, 41 N.W. 638, 639 (Neb. 1889).

In short, to the extent the law requires it, "one who employ[s] his private property for purposes of commercial gain by offering goods or services to the public must stick to his bargain." *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 284 (1964) (Douglas, J., concurring) (quoting S. Rep. No. 872,

88th Cong., 2d Sess. 22 (1964)). Religion offers no trump card over anti-discrimination laws. Excluding same-sex couples from marriage simply to foreclose potentially meritorious discrimination claims against a commercial business (where such anti-discrimination laws exist) is not a legitimate governmental interest.

No matter how they are framed, the "religious freedom" arguments can gain no traction in cases like these, involving a challenge to a discriminatory marriage law. This Court is not in the habit of upholding discriminatory laws to protect religious prerogatives. The proponents of these arguments would do better to recognize that religious liberty is best safeguarded when religious groups retain the freedom to define religious marriage for themselves, and to remember that *civil* marriage is an institution of government, which is prohibited from enacting laws based on particular religious viewpoints. *See* § II.A, *supra*.

Finally, Respondents' and *amici*'s argument that the Court should leave the issue of marriage equality to state legislatures and the democratic process (*see, e.g.*, Br. for Petitioners, pp. 51-54, *Obergefell v. Hodges*, No. 14-556 (U.S. Feb. 27, 2015)) are rooted in a fundamental misunderstanding of the operation of the Equal Protection Clause. Under such a theory, grounded in the reasoning of *Dred Scott*, this Court should have abstained from deciding cases like *Brown* and *Loving*; the Court instead should have waited for the state legislatures to vindicate equal rights. That is not how the Fourteenth Amendment works.

It took 60 years for *Plessy*'s mandate of "separate but equal" to be reversed, and it was not the legislatures or the people who reversed it; it was this Court. *See*

Brown, 347 U.S. at 493-95. Rightly so. When a law violates the constitutional guarantee of equality, it cannot be saved by an appeal to a hypothetical more enlightened future.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed.

Respectfully submitted,

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APPENDIX

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AMICI CURIAE STATEMENTS OF INTEREST

Amicus curiae Anti-Defamation League ("ADL") was founded in 1913 to combat anti-Semitism and other forms of prejudice, and to secure justice and fair treatment to all. Today, ADL is one of the world's leading civil rights organizations. As part of its commitment to protecting the civil rights of all persons, ADL has filed amicus briefs in numerous cases urging the unconstitutionality or illegality of discriminatory practices or laws, including *United States v. Windsor*, 570 U.S. ___, 133 S. Ct. 2675 (2013); *Hosanna-Tabor Evangelical Lutheran Church and School v. E.E.O.C.*, 132 S. Ct. 694 (2012); *Christian Legal Society v. Martinez*, 130 S. Ct. 2971 (2010); *Lawrence v. Texas*, 539 U.S. 558 (2003); *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002); *Alexander v. Sandoval*, 532 U.S. 275 (2001); *Boy Scouts of America v. Dale*, 530 US 640 (2000); *Mitchell v. Helms*, 530 U.S. 793 (2000); and *Romer v. Evans*, 517 U.S. 620 (1996). ADL has a substantial interest in this case. At issue are core questions about equality, constitutional rights, and religious freedom. And the justifications offered by Respondents and their *amici*—if embraced by this Court—would invite state-sanctioned prejudice of the strain that ADL has long fought.

Amicus curiae the American Jewish Committee ("AJC"), a national organization of more than 125,000 members and supporters with 22 regional offices, was founded in 1906 to protect the rights of American Jews. AJC has long believed that one of the most effective ways to achieve that goal is to ensure that all citizens enjoy the equal protection of the laws and

equal rights of citizenship. These equal rights include the right to marry.

AJC's position on official recognition of same-sex relationships has evolved. In a Resolution adopted in 2013, AJC insisted that the basic American principles of equality and human dignity require that the federal and state governments extend the legal and economic benefits of marriage to those Americans who love people of the same gender. That right cannot be denied merely because other citizens find such relationships offensive or religiously objectionable.

As its brief in *Hollingsworth v Perry*, Nos. 12-144 and 12-307 (Feb. 28, 2013), made plain, AJC is also a strong supporter of religious liberty. Accordingly, it does not at this time join Section III.C of this brief. On some of the matters discussed there, AJC is not in agreement, and on others it has not yet taken a position.

Amicus curiae Bend the Arc: A Jewish Partnership for Justice, is a national organization inspired by Jewish values and the steadfast belief that Jewish Americans, regardless of religious or institutional affiliations, are compelled to create justice and opportunity for Americans.

Amicus curiae the Central Conference of American Rabbis ("CCAR"), whose membership includes more than 2,000 Reform rabbis, and the Women of Reform Judaism, which represents more than 65,000 women in nearly 500 women's groups in North America and around the world, oppose discrimination against all individuals, including gays and lesbians, for the stamp of the Divine is present in each and every human being. As Jews, we are taught in the very beginning of the Torah that God created humans B'tselem Elohim,

in the Divine Image, and therefore the diversity of creation represents the vastness of the Eternal (Genesis 1:27). Thus, we unequivocally support equal rights for all people, including the right to a civil marriage license. Furthermore, we whole-heartedly reject the notion that the state should discriminate against gays and lesbians with regard to civil marriage equality out of deference to religious tradition, as Reform Judaism celebrates the unions of loving same-sex couples and considers such partnerships worthy of blessing through Jewish ritual.

Amicus curiae the Global Justice Institute is the social justice arm of Metropolitan Community Churches ("MCC"). We are separately incorporated, though we originally began as a "ministry" of MCC. We are working in Asia, Pakistan, Eastern Europe, Latin America, the Caribbean, Canada, the United States, East Africa and South Africa on matters of social justice and public policy primarily in the LGBTI communities, but also along lines of intersection with other marginalized communities.

Amicus curiae Hadassah, The Women's Zionist Organization of America, founded in 1912, has over 330,000 Members, Associates, and supporters nationwide. In addition to Hadassah's mission of initiating and supporting pace-setting health care, education, and youth institutions in Israel, Hadassah has a proud history of protecting the rights of women and the Jewish community in the United States. Hadassah vigorously condemns discrimination of any kind and, as a pillar of the Jewish community, understands the dangers of bigotry. Hadassah strongly supports the constitutional guarantees of religious liberty and equal protection, and rejects discrimination on the

basis of sexual orientation. Hadassah supports government action that provides civil status to committed same-sex couples and their families equal to the civil status provided to the committed relationships of men and women and their families, with all associated legal rights and obligations, both federal and state.

Amicus curiae Hindu American Foundation ("HAF") is an advocacy organization for the Hindu American community. The Foundation educates the public about Hinduism, speaks out about issues affecting Hindus worldwide, and builds bridges with institutions and individuals whose work aligns with HAF's objectives. HAF focuses on human and civil rights, public policy, media, academia, and interfaith relations. Through its advocacy efforts, HAF seeks to cultivate leaders and empower future generations of Hindu Americans.

Since its inception, the Hindu American Foundation has made legal advocacy one of its main areas of focus. From issues of religious accommodation, religious discrimination, and hate crimes to defending fundamental constitutional rights of free exercise and the separation of church and state, HAF nas educated Americans at large and the courts about various aspects of Hinduism and issues impacting the Hindu American community, either as a party to the case or an *amicus curiae*.

Amicus curiae Interfaith Alliance Foundation celebrates religious freedom by championing individual rights, promoting policies that protect both religion and democracy, and uniting diverse voices to challenge extremism. Founded in 1994, Interfaith Alliance's members across the country belong to 75 different faith traditions as well as no faith tradition. Interfaith Alliance supports people who believe their religious freedoms have been violated as a vital part of its work

promoting and protecting a pluralistic democracy and advocating for the proper boundaries between religion and government. Interfaith Alliance also seeks to shift the perspective on LGBT equality from that of problem to solution, from a scriptural argument to a religious freedom agreement, and to address the issue of equality as informed by our Constitution. *Same-Gender Marriage and Religious Freedom: A Call to Quiet Conversations and Public Debates*, a paper by Interfaith Alliance President, Rev. Dr. C. Welton Gaddy, offers a diversity of ideas based on Interfaith Alliance's unique advocacy for religious freedom and interfaith exchange.

Amicus curiae Japanese American Citizens League ("JACL"), founded in 1929, is the nation's largest and oldest Asian-American non-profit, non-partisan organization committed to upholding the civil rights of Americans of Japanese ancestry and others. It vigilantly strives to uphold the human and civil rights of all persons. Since its inception, JACL has opposed the denial of equal protection of the laws to minority groups. In 1967, JACL filed an amicus brief in *Loving v. Virginia*, urging the Supreme Court to strike down Virginia's anti-miscegenation laws, and contending that marriage is a basic civil right of all persons. In 1994, JACL became the first API non-gay national civil rights organization, after the American Civil Liberties Union, to support marriage equality for same-sex couples, affirming marriage as a fundamental human right that should not be barred to same-sex couples. JACL continues to work actively to safeguard the civil rights of all Americans.

Amicus curiae Jewish Social Policy Action Network ("JSPAN") is a membership organization of American Jews dedicated to protecting the Constitutional

liberties and civil rights of Jews, other minorities, and the vulnerable in our society. For most of the last two thousand years, whether they lived in Christian or Muslim societies, Jews were a small religious minority victimized by prejudice and lacking sufficient political power to protect their rights. During the Holocaust, not only Jews, but gays and lesbians, Gypsies and others were targeted for persecution and death at the hands of the Nazis. Perhaps because of their sh..red history as victimized outsiders, Jews have been especially sensitive to the plight of the lesbian and gay community as a discrete and insular minority within American society and throughout much of the world. As one of many voices within the progressive Jewish community, JSPAN is committed to making marriage under civil law available to consenting couples without regard to their sexual orientation.

Amicus curiae Keshet is a national organization that works for the full equality and inclusion of lesbian, gay, bisexual, and transgender ("LGBT") Jews in Jewish life. Led and supported by LGBT Jews and straight allies, Keshet cultivates the spirit and practice of inclusion in all parts of the Jewish community. Keshet is the only organization in the U.S. that works for LGBT inclusion in all facets of Jewish life – synagogues, Hebrew schools, day schools, youth groups, summer camps, social service organizations, and other communal agencies. Through training, community organizing, and resource development, we partner with clergy, educators, and volunteers to equip them with the tools and knowledge they need to be effective agents of change.

Amicus curiae Metropolitan Community Churches ("MCC") was founded in 1968 to combat the rejection of and discrimination against persons within religious

life based upon their sexual orientation or gender identity. MCC has been at the vanguard of civil and human rights movements and addresses the important issues of racism, sexism, homophobia, ageism, and other forms of oppression. MCC is a movement that faithfully proclaims God's inclusive love for all people and proudly bears witness to the holy integration of spirituality and sexuality.

Amicus curiae More Light Presbyterians represents lesbian, gay, bisexual, and transgender people in the life, ministry, and witness of the Presbyterian Church (U.S.A.) and in society.

Amicus curiae National Council of Jewish Women ("NCJW") is a grassroots organization of 90,000 volunteers and advocates who turn progressive ideals into action. Inspired by Jewish values, NCJW strives for social justice by improving the quality of life for women, children, and families and by safeguarding individual rights and freedoms. NCJW's Resolutions state that NCJW resolves to work for "Laws and policies that provide equal rights for same-sex couples." Our principles state that "Religious liberty and the separation of religion and state are constitutional principles that must be protected and preserved in order to maintain our democratic society" and "discrimination on the basis of race, gender, national origin, ethnicity, religion, age, disability, marital status, sexual orientation, or gender identity must be eliminated." Consistent with our Principles and Resolutions, NCJW joins this brief.

Amicus curiae Nehirim is a national community of lesbian, gay, bisexual, and transgender Jews, partners, and allies. Nehirim's advocacy work centers on building a more just and inclusive world based on the teachings in the Jewish tradition.

Amicus curiae People For the American Way Foundation ("PFAWF") is a nonpartisan civic organization established to promote and protect civil and constitutional rights, including religious liberty and equal protection of the laws. Founded in 1981 by a group of civic, educational, and religious leaders, PFAWF now has hundreds of thousands of members nationwide. Over its history, PFAWF has conducted extensive education, outreach, litigation, and other activities to promote these values. PFAWF strongly supports the principle of the Free Exercise Clause of the Constitution as a shield for the exercise of religion, protecting individuals of all faiths. PFAWF is concerned, however, about efforts, historically and in this case, to transform this important shield into a sword to attack the rights of third parties to be free from discrimination with respect to marriage and in other areas, which ultimately have been rejected by this Court, and accordingly joins this brief.

Amicus curiae Presbyterian Welcome works for the full participation of individuals in contexts of faith, regardless of sexual orientation, gender identity or expression. As followers of Christ, convinced by Scripture, we labor for a world where all persons might live into the calling that God has placed in their hearts. We are a resource, training current and future leaders of church and society.

Amicus curiae ReconcilingWorks: Lutherans For Full Participation organizes lesbian, gay, bisexual, and transgender individuals and their allies within the Lutheran communion and its ecumenical and global partners.

Amicus curiae Reconstructionist Rabbinical College and Jewish Reconstructionist Communities educates

leaders, advances scholarship, and develops resources for contemporary Jewish life.

Amicus curiae Religious Institute, Inc. is a multi-faith organization whose thousands of supporters include clergy and other religious leaders from more than fifty faith traditions. The Religious Institute, Inc. partners with the leading mainstream and progressive religious institutions in the United States.

Amicus curiae the Sikh American Legal Defense and Education Fund ("SALDEF") was founded in 1996 and is the oldest Sikh American civil rights and educational organization. We empower Sikh Americans through advocacy, education, and media relations. SALDEF's mission is to protect the civil rights of Sikh Americans and ensure a fostering environment in the United States for future generations.

Amicus curiae Society for Humanistic Judaism ("SHJ") mobilizes people to celebrate Jewish identity and culture, consistent with Humanistic ethics and a nontheistic philosophy of life. Humanistic Jews believe each person has a responsibility for their own behavior, and for the state of the world, independent of any supernatural authority. The SHJ is concerned with protecting religious freedom for all, and especially for religious, ethnic, and cultural minorities such as Jews, and most especially for Humanistic Jews, who do not espouse a traditional religious belief. Humanistic Jews support the right and responsibility of adults to choose their marriage partners. The Society for Humanistic Judaism supports the legal recognition of marriage and divorce between adults of the same sex, and affirms the value of marriage between any two committed adults with the sense of obligations, responsibilities, and consequences thereof.

Amicus curiae South Asian Americans Leading Together ("SAALT") is a national non-profit organization whose mission is to elevate the voices and perspectives of South Asian individuals and organizations to build a more just and inclusive society in the United States. As an organization that is committed to importance of equality and civil rights, SAALT joins this brief in an effort to ensure that the Constitution is not violated and all individuals are treated equally, regardless of their sexual orientation.

Amicus curiae T'ruah: The Rabbinic Call for Human Rights is an organization led by rabbis from all denominations of Judaism that acts on the Jewish imperative to respect and protect the human rights of all people. Our commitment to human rights begins with the Torah's declaration that all people are created in the image of God (Genesis 1:26). Within the Jewish canon, this core belief leads to teachings that equate harming a human being with diminishing the image of God. (See, for example, B'reishit Rabbah 34:14 and Mishnah Sanhedrin 6:5.) People of faith are not of one mind opposing civil marriage equality, and many interpretations of religion, including ours, support equal marriage rights. Judaism insists on the equality of every person before the law. The Torah instructs judges, "You shall not judge unfairly; you shall show no partiality" (Deuteronomy 16:19). Jewish law has developed strict guidelines to ensure that courts function according to this principle. The rights and protections afforded by civil marriage are legal and not religious in nature. The case at hand addresses tax obligations that may be incumbent on some couples married according to the laws of their state, but not on others. Jewish law accepts that "the law of the land is the law," and upholds the right of the government to impose taxes on its citizens. However,

major Jewish legal authorities classify as "theft" a tax levied on one subgroup and not on another (Maimonides, Mishneh Torah, Laws of Theft 5:14; Shulchan Aruch, Hoshen Mishpat 369:8). We thus believe it is important to state that people of faith are not of one mind opposing civil marriage equality, and that many interpretations of religion actually support such equality. The Universal Declaration of Human Rights similarly guarantees to every person equal rights, without "distinction of any kind," and specifies that "Men and women of full age * * * are entitled to equal rights as to marriage, during marriage and at its dissolution." While each rabbi or religious community must retain the right to determine acceptable guidelines for religious marriage, the state has an obligation to guarantee to same-sex couples the legal rights and protections that accompany civil marriage. Doing otherwise constitutes a violation of human rights, as well as the Jewish and American legal imperatives for equal protection under the law.

Amicus curiae Women's League for Conservative Judaism ("WLCJ") is the largest synagogue based women's organization in the world. As an active arm of the Conservative/Masorti movement, we provide service to hundreds of affiliated women's groups in synagogues across North America and to thousands of women worldwide. WLCJ strongly supports full civil equality for gays and lesbians with all associated legal rights and obligations, both federal and state and rejects discrimination on the basis of sexual orientation.